5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in denying petitioner's motion for a new trial grounded on an alternate juror's affidavit that, prior to the jury's final deliberation, some of the jurors indicated their belief that petitioner was guilty and stated that they should be "careful" because the Internal Revenue Service might investigate them.

2. Whether the trial court should have directed an acquittal because of the government's failure to investigate so-called "leads" furnished by petitioner.

3. Whether the evidence is sufficient to sustain the conviction.

4. Whether the trial court committed prejudicial error by refusing to allow petitioner to present evidence which allegedly showed an attempt to intimidate his prospective witnesses.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> [26 U.S.C. 7201]

STATEMENT

Petitioner, a surgeon, was convicted by a jury in the United States District Court for the Southern District of New York on three counts of willfully attempting to evade and defeat his income taxes for the years 1956, 1957 and 1958 by filing false and fraudulent tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954, and sentenced to imprisonment and fine (R. 5a, 7a–9a; Pet. 2a). The court of appeals unanimously affirmed (Pet. App. 1a–8a), and denied rehearing *en banc* (Pet. App. 10a).

The government's proof of unreported income was based on the so-called bank deposits method, under which the existence of non-reported taxable income may be established by showing (1) that the taxpayer was engaged in an income-producing activity; (2) that he made periodic deposits in bank accounts that were under his control, in an amount exceeding his reported gross receipts; and (3) that the government took reasonable steps to exclude from its computation all non-income items, such as redeposits, amounts transferred between accounts, loans, gifts, or deposits from a prior accumulation of cash. In the present case the government supplemented this proof by showing specific items of income which petitioner did not deposit in his bank accounts (Govt. Exs. 502, 503, 504, 505; Supp. R. 77a, 104a–107a; R. 929a–950a, 974a).

The government's evidence showed that, in addition to the $65,279.10 total gross income from his practice that petitioner reported for the years 1956 through 1958, he had the following unreported professional in-

come (Govt. Exs. 1A, 2A, 3A, 502; R. 2100a–2104A; Supp. R. 104a):

1956	$11,071.66
1957	16,280.66
1958	15,059.23
Total	$42,411.55

Petitioner's principal defense was that the unreported gross receipts did not reflect additional income because he paid substantially that amount to assisting doctors who had referred the patients to him (Ex. AAP, R 2119a). To support this claim, petitioner called sixteen doctors who testified that they had an arrangement with petitioner whereby he would give them 50 percent of the fee he collected from the patients (R. 1299a–1300a, 1323a–1324a, 1351a–1352a, 1450a, 1487a, 1503a, 1521a, 1543a, 1549a–1550a, 1590a, 1594a, 1638a, 1685a, 1707a). Seven of those doctors produced records of professional receipts (Deft. Exs. AB, AC, AD, AE, AF, AG, AH, AI, AJ, AL, AM, AN, AO, AP, X, Y, Z, AS–1), but most of those records did not show any receipt of such payments from petitioner. The remaining nine doctors produced no records (R. 1465a, 1493a, 1501a, 1520a, 1551a, 1623a, 1636a–1637a, 1683a, 1709a). The government produced thirteen patients who testified that they paid directly to the assisting doctors a fee which, with one exception, was closer to 20 percent than to 50 percent of the total fee.[2] The court instructed the jury to

[2] Patients testified concerning fees paid to the following doctors: Dr. Albanese (R. 679a–680a, 772a–773a; Supp. R. 53a); Dr. Giacomo (R. 818a–819a, 821a); Dr. Alvino (R. 650a–651a, 661a–662a, 1322a–1325a); Dr. Mastropolo (R. 466a, 842a; Supp. R. 50a, 55a, 60a, 61a); Dr. Klauber (Supp. R. 55a, 60a); Dr. De Francesco (Supp. R. 56a).

acquit if they believed the testimony of the doctors called by petitioner (R. 1997a).

The so-called leads which petitioner furnished. Special Agent English of the Internal Revenue Service, who had been assigned to investigate petitioner's returns, telephoned petitioner in June, 1959, and petitioner told English that he had retained an accountant, Dominick Alleva, to represent him in the investigation (R. 182a). When the agent pointed out to Alleva that there were substantial discrepancies between petitioner's gross income as shown on his tax returns—which had been prepared by an accountant named Lo Casto (R. 225a–227a, 255a, 261a–262a)—and as reflected in his bank deposits, Alleva suggested that the discrepancy for 1956 might have been due to the sale of securities, but offered no explanation of the $16,000 discrepancy for 1957 (R. 192a–193a). Alleva stated the petitioner's gross professional income should be reduced by the amount of referral fees paid to other doctors, *viz.*, $720 in 1956 and $1,195 in 1957 R. 189a–190a, 191a). In April, 1961, when English pointed out to Alleva discrepancies of $10,000 for 1956 and $14,700 for 1957, Alleva's only suggestion was that petitioner must have understated his gross receipts (Supp. R. 9a). At no time during the investigation, which continued for more than three years, did petitioner or his representatives ever suggest that the discrepancies reflected petitioner's disbursements to other doctors (Supp. R. 112a–113a).

When the Internal Revenue Service referred the case to the Department of Justice for criminal prose-

cution, petitioner's counsel stated in a letter to the Attorney General dated December 3, 1962, that petitioner had paid "many thousands of dollars" to assisting doctors (R. 2085a). Neither the letter (R. 2078a–2089a) nor the attached doctors' affidavits (R. 2090a–2099a) listed any specific amounts thus allegedly paid. The letter stated that there had not been time to ascertain those data, but that "we hope to have" that information "shortly" (R. 2085a).

Since the statute of limitations on the offense for 1956 taxes was due to expire in April 1963, the Department of Justice early in 1963 referred the case to the United States Attorney for prosecution. Petitioner's counsel never furnished the government with the specific amounts that petitioner allegedly paid to other doctors (R. 1908a–1909a).

The alleged intimidation of petitioner's witnesses. Following the return of the indictment, petitioner's counsel again contended (in a letter to the United States Attorney) that the payments to other doctors would offset petitioner's unreported income (Supp. R. 114a). Early in 1964, the United States Attorney attempted to interview the ten doctors whose affidavits had accompanied counsel's letter of December 3, 1962, to the Department of Justice. Upon the advice of petitioner's counsel, however, eight of them refused to talk with the prosecutor (Supp. R. 114a, 116a, R. 1198a–1199a, 1201a); the two doctors whom he was able to interview furnished incomplete and unsatisfactory information (Supp. R. 114a, R. 1239a–1246a).

After the doctors declined to be interviewed, the government served them with grand jury subpoenas. Petitioner moved to quash the subpoenas (Supp. R. 123a–124a), and in response the government submitted a sworn statement that hospital books and records showing operations performed by petitioner were missing and that the grand jury was investigating the possible obstruction of justice in this case (Supp. R. 116a, 123a–124a). The government did not then wish to disclose that petitioner's representative, Alleva, had three times offered a bribe to Lo Casto, who had prepared petitioner's tax returns, if the latter would give a false affidavit concerning payments to other doctors (Supp. R. 114a, 124a), although it offered to give the court all the facts *in camera* (Supp. R. 124a). The district court quashed the subpoenas, on the ground that "the dominant if not the sole reason" for their issuance was to compel the doctors to disclose to an Assistant United States Attorney the testimony they would give on behalf of petitioner (R. 27a). The government appealed (Supp. R. 122a, 124a), but the court dismissed the appeal as moot after the case had been argued, on the basis of the government's statement that another revenue agent had the allegedly missing records (R. 27a–28a). (It subsequently developed, however, that he did not have the records, Supp. R. 124a–125a.)

The trial court refused to allow petitioner to present before the jury evidence relating to this alleged intimidation of his witnesses (R. 1201a).

219-492—66—2

The alleged bias of jurors. Petitioner filed a motion for a new trial in which he contended, among other things, that "a number of jurors" were biased and prejudiced (R. 70a). He submitted an affidavit (R. 78a–84a) by an alternate juror, who was excused when the case was submitted to the jury (R. 78a), that during the trial several jurors had stated that petitioner was guilty (R. 78a); that they had "better be careful about what we do in this case because the Internal Revenue Service is liable to investigate all of us" (R. 80a); that doctors could cheat on their taxes because they often received cash payments (R. 80a); and that particular items of evidence indicated petitioner's guilt (R. 79a, 81a, 82a).

The district court denied the motion (R. 112a). Noting that the alternate juror's affidavit "refers to the statements of fellow jurors concerning their personal reactions to the evidence as it was submitted at the trial" (R. 109a), the court ruled that the affidavit was "not sufficient to justify a hearing of inquiry or to warrant a new trial" (R. 110a–111a). The court stated (R. 109a–110a) that the policy considerations that bar members of the jury from impeaching their verdict on the basis of events during the jury's deliberations were equally applicable to petitioner's attempt to impeach the verdict on the basis of the jurors' statements during the trial.

ARGUMENT

1. The district court correctly refused to grant petitioner a new trial on the basis of the alternate juror's affidavit setting forth certain statements that some of

the jurors allegedly made during the trial. As the district court correctly characterized the affidavit, it primarily set forth "statements of fellow jurors concerning their personal reactions to the evidence as it was submitted at the trial" (R. 109a). Their comments that petitioner appeared guilty did not reflect any bias against him, but only their tentative evaluation of the government's case as it developed, viewing the evidence in the light of their own experience. Nor did the view attributed to some jurors that they had "better be careful about what we do in this case because the Internal Revenue Service is liable to investigate all of us" (R. 80a) show that they had concealed a bias when they did not respond to the court's questions on the *voir dire* whether any prospective juror had "any prejudice for or against the Internal Revenue Service" or had any pending proceedings "connected with" the Service or "in the past had any contacts with the Internal Revenue Service affecting your own tax status which may have created any feeling of prejudice for or against the Service" (R. 144a–145a).

The rule is, of course, well settled that a jury's verdict cannot be impeached by statements of jurors as to the factors that influenced them in reaching their decision. See *Hyde* v. *United States*, 225 U.S. 347, 383–384; *McDonald* v. *Pless*, 238 U.S. 264; *United States* v. *Crosby*, 294 F. 2d 928, 949–950 (C.A. 2), certiorari denied *sub nom. Mittleman* v. *United States*, 368 U.S. 984. The rule rests on sound considerations of public policy. It is designed to prevent the "destruction of all frankness and freedom of discussion

and conference" among jurors that would result if they could be "harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict" (*McDonald, supra,* at 267–268). These considerations are also applicable to attempts to set aside a verdict on the basis of statements made by jurors to each other during the trial. For permitting such an inquiry similarly would have a deleterious effect upon the freedom of discussion that is vital to the effective functioning of the jury system.

As the Court of Appeals for the Seventh Circuit stated, in refusing to set aside a verdict on the basis of a juror's affidavit that two other jurors had intimated at the beginning of the trial that they believed that the defendant was guilty: "It will be observed that these were conversations in the jury room among the jurors during the progress of the trial. There is nothing to show that they in anywise affected the final verdict * * *" (*United States* v. *Furlong,* 194 F. 2d, 1, 4 (C.A. 7), certiorari denied, 343 U.S. 950). The inquiry upon which petitioner would have the district court embark ultimately could lead to the very kind of probing of the jury's decisional process that is immune from judicial scrutiny except in the most unusual circumstances. The district court was not required to set aside the jury's verdict—or, indeed, to hold a hearing—on the basis of petitioner's generalized claim of improprieties by jury members, a claim which was

based upon alleged statements of jurors made to each other during the trial.[3]

2. The evidence fully justified the jury in concluding that petitioner willfully understated his income by a substantial amount.

a. The government's proof of the substantial disparities between the amounts petitioner deposited in his bank accounts and the amounts he reported on his tax returns as his gross receipts from professional activities adequately established that petitioner had substantially understated his income. In making its calculations, the government excluded from the bank deposits those items that were not reasonably likely to have reflected professional income. Thus, the government excluded all cash deposits (many of which could have reflected professional fees); all dividends and similar items which petitioner had available for deposit, whether or not he deposited them (R. 981a; Supp. R. 77a–78a); all funds transferred from other

[3] The cases which petitioner cites (Pet. 31–32) are not in conflict with the decision below on this point, since none of them involved an attempt to impeach a jury's verdict on the basis of statements made among jurors during the trial. In *Washington Gas Light Co.* v. *Connolly*, 214 F. 2d 254 (C.A.D.C.), a juror privately had obtained information from an expert to aid her in deciding the case. In *Consoliated Gas & Equipment Co. of America* v. *Carver*, 257 F. 2d 111 (C.A. 10), and *Photostat Corporation* v. *Ball*, 338 F. 2d 783 (C.A. 10), a juror falsely denied on *voir dire* that he had ever been involved in an accident case. In *Rubenstein* v. *United States*, 227 F. 2d 638 (C.A. 10), Treasury agents had questioned members of a jury panel in a way likely to have intimated them. In *United States* v. *Alker*, 180 F. Supp. 661 (E.D. Pa.), a juror had learned about a defendant's prior offenses.

banks (R. 932a); and all deposits of large sums, which were not typical of petitioner's fees (R. 933a–944a). Contrary to petitioner's contention (Pet. 36–37), the courts of appeals frequently have upheld the bank deposit method for proving an income tax fraud case, and the government's evidence here fully satisfied the standard of proof which those cases require. *United States* v. *Nunan*, 236 F. 2d 576 (C.A. 2), certiorari denied, 353 U.S. 912; *United States* v. *Venuto*, 182 F. 2d 519, 521 (C.A. 3); *Beard* v. *United States*, 222 F. 2d 84 (C.A. 4), certiorari denied, 350 U.S. 846; *Stinnett* v. *United States*, 173 F. 2d 129 (C.A. 4), certiorari denied, 337 U.S. 957; *Holbrook* v. *United States*, 216 F. 2d 238 (C.A. 5), certiorari denied, 349 U.S. 915; *Gleckman* v. *United States*, 80 F. 2d 394, 399–400 (C.A. 8), certiorari denied, 297 U.S. 709; *Kirsch* v. *United States*, 174 F. 2d 595, 601 (C.A. 8); *Graves* v. *United States*, 191 F. 2d 579 (C.A. 10).

Petitioner's only explanation for the approximately $42,000 in unreported bank deposits from 1956 to 1958 was that he paid substantially that amount to other doctors. Apart from the belated character of this claim—it was never made during the more than three years that the government was investigating petitioner—there was other evidence that warranted the jury in rejecting it. Lo Casto, who had prepared petitioner's tax returns, knew only of annual payments to doctors of $1,200 or less (R. 244a–245a, 264a). Almost none of petitioner's patients knew about the asserted fee-sharing (although the doctors who allegedly received the payments stated otherwise,

Supp. R. 114a). Patients who made direct payments to the other doctors paid them substantially less than the 50 percent which petitioner allegedly turned over to them (*supra*, p. 4). Although a number of doctors testified that petitioner had made such payments to them, they produced no records specifically showing such payments (*supra*, p. 4). In all the circumstances the jury, which saw the doctors' demeanor on the stand, was warranted in disbelieving them.

The fact, to which the prosecutor alluded in his summation (R. 1976a), that the government conceded that petitioner had made some payments to the doctors but was unable to ascertain their exact amount, was not a fatal weakness in the government's case. The government was not required to prove the precise amount by which petitioner understated his income; it was enough that it proved, as it did here, that he had done so by a substantial amount. See *United States* v. *Johnson*, 319 U.S. 503, 517.

b. Petitioner's willfulness was shown by the consistent pattern of substantial understatements of income. See *Holland* v. *United States*, 348 U.S. 121, 139. In addition, petitioner did not maintain and utilize normal income records. Petitioner did not furnish Lo Casto with records of his gross receipts, but merely gave him a gross figure for each year (R. 242a–243a, 245a–246a, 257a–258a, 263a–264a). Petitioner received 82 checks for professional fees which he did not deposit; these checks, together with fees received in cash, amounted to $8,944.50 in 1956, $12,277.00 in 1957, and $14,123.66 in 1958 (Govt. Ex. 502; Supp.

R. 104a). Petitioner made substantial deposits of income directly in brokerage accounts (Govt. Ex. 502; Supp. R. 104a). He asked patients to pay in cash rather than by check (R. 539a, 549a–552a; Supp. R. 32a–33a). The evidence fully justified the jury in concluding that petitioner's understatement of income was intentional rather than inadvertent.

3. In *Holland* v. *United States, supra,* the Court stated that in net worth cases the government must investigate leads reasonably susceptible of investigation, and that the trial judge "may" direct a verdict where this has not been done (348 U.S. at 136). It is unnecessary to decide in this case whether the rule applies to a bank deposits case, since here, as the district court correctly held (R. 89a–101a), the government was not remiss in this regard.

Petitioner contends (Pet. 11–16) that when in December 1962 he told the Department of Justice that he had paid "many thousands of dollars" to other doctors (but without stating any specific amounts) and submitted affidavits of doctors that they had received payments from him (*supra,* pp. 5–6), the government was required to investigate those leads. But petitioner made this claim only after the investigation had been under way for over three years, and at its very beginning his representative Alleva conceded to the Internal Revenue Service agents that understatements of income appeared to be the only explanation of at least some of the discrepancies they had discovered (Supp. R. 9a). In the interval petitioner had more

than ample time to submit to the government any facts he had with respect to the alleged payments. Since the government's investigation had been completed by December 1962, and since the statute of limitations was soon to run upon some of the offenses which that investigation had disclosed, the government was not required, because of this belated submission of a few doctors' names but without supporting data, to defer presenting the matter to the grand jury for the purpose of further investigation.

Moreover, when the government attempted to interview the doctors after the indictment had been returned, petitioner's counsel advised them not to be interviewed. If such interviews had been held, and if the doctors had been able to satisfy the government that petitioner's defense was valid, the government might have dismissed the indictment.

4. Contrary to petitioner's contention (Pet. 55–58), the district court correctly refused to permit petitioner to present to the jury the facts surrounding the government's attempts to subpoena the doctors after they had refused to be interviewed (*supra*, pp. 6–7). Those facts were irrelevant to any issue the jury had to decide; they would only have confused the jury. Moreover, since the doctors testified at the trial on petitioner's behalf, the government's unsuccessful attempt to subpoena them neither intimidated them from testifying nor otherwise prejudiced petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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